TO: MEMBERS OF THE JUDICIARY COMMITTEE
FROM: KURT BARWIS, PRESIDENT & CEO, BRISTOL HOSPITAL
DATE: April 1, 2013

RE: Opposition to Raised House Bill No. 6687 and Senate Bill 1154

Senator Coleman, Representative Fox, and distinguished Members of the Judiciary Committee, my name is Kurt Barwis. I am President and CEO of Bristol Hospital. Thank you for the opportunity to present this testimony in strong opposition to House Bill 6687, "An Act Concerning Certificates of Merit," and Senate Bill 1154, "An Act Concerning the Accidental Failure of Suit Statute."

I. HB 6687 WILL CAUSE MORE FRIVILOUS LAWSUITS TO BE FILED.

The Connecticut Legislature first enacted Connecticut General Statutes § 52-190a in 1986 as part of tort reform. The statute is commonly referred to as the "Certificate of Merit" statute. In passing the Certificate of Merit statute, the Legislature was responding to a crisis in health care providers' ability to obtain medical malpractice insurance as well their continued ability and willingness to continue practicing in Connecticut.

The purpose of the statute was to benefit health care providers, including hospitals, and prevent frivolous actions by requiring plaintiffs or their counsel to certify that they had a "good faith" basis for bringing the suit based on a reasonable pre-suit investigation. To ease the burden on prospective plaintiffs and their counsel, the Legislature provided for an automatic 90-day extension of the statute of limitations to allow plaintiffs and their counsel extra time to conduct the good faith inquiry.

Because the 1986 legislation did not require a plaintiff to verify his "good faith" by consulting a qualified expert prior to filing suit, the Certificate of Merit statute did very little to actually stop the filing of frivolous suits. In 2005, the statute was strengthened to require that an

attorney obtain a written opinion from a "similar health care provider" prior to filing suit and mandated dismissal for failure to do so. The "similar health care provider" provision in the statute is an "apples to apples" requirement. For example, if a plaintiff accuses an emergency medicine physician of malpractice, the plaintiff must first get an opinion from another emergency medicine physician. An opinion from a surgeon or an internist will not suffice. The expert must match up with the specialty of the accused health care provider. The rationale for the apples to apples requirement is simple and fair: to insure that the author of the written opinion has walked in the shoes of the health care provider that he or she is accusing of malpractice.

HB 6687 Raised Bill 243 eliminates the requirement that a plaintiff obtain an opinion from a "similar health care provider" and provides that a "qualified health care provider" will suffice. A "qualified health care provider" is defined as "a similar health care provider ... or any other health care provider who may testify as an expert pursuant to subsection (d) of section 52-184c." Under section 52-184c, a health care provider is qualified to testify if "to the satisfaction of the court, possesses sufficient training, experience and knowledge ... to provide expert testimony as to the prevailing professional standard of care in a given field of medicine." In other words, under HB 6687 the type of expert whom the plaintiff may consult prior to filing suit is identical to the type of expert plaintiff must have at the time of trial.

Here is the problem with HB 6687. At the time of trial, defense attorneys will have taken the deposition of an expert witness and determined whether the person is, indeed, qualified. A defense attorney can then file a motion at the time of trial asking the judge to preclude the proposed expert on the ground that he is not qualified. The judge will, at the time of trial, hold an evidentiary hearing at which the expert is cross-examined or, in the alternative, his deposition

testimony is reviewed by the judge. The expert will have been cross-examined during the deposition.

HB 6687 still allows a plaintiff to ***expunge*** the name of the expert on the written opinion and, therefore, the expert's identity is a secret. (See lines 32-34 of HB 6687). As a result, it is impossible for a court to determine if the expert is really qualified. So both the court and the defense are at the mercy of whatever information the plaintiff chooses to put in the written opinion. Because the only evidence that will ever be submitted to the court is the unchallenged claims in the anonymous expert's letter, a court will always have to conclude that the expert is qualified. Unless the statute gives defendants the right to have a meaningful hearing (i.e., the right to cross-examine the anonymous author), the statutory guarantee that only "qualified" experts may be relied upon by plaintiffs prior to bringing suit will be illusory.

The statutory requirement that a plaintiff obtain, prior to commencement of an action, a written expert opinion from a similar health care provider has reaped benefits for Connecticut health care providers who otherwise would have had endure the trials and tribulations of the litigation process in inadequately investigated cases. If Raised Bill 243 is passed, it will eliminate the beneficial effects of the 2005 amendments to the Certificate of Merit statute and return Connecticut health care providers to the mercy of lawyers and parties who fail to properly investigate lawsuits before filing them. Moreover, Connecticut health care providers will be doubly wronged, because the Raised Bill leaves intact the benefits to plaintiffs that were traded in return for the statute's extra burdens -- statutory caps on jury verdicts and extension of statutes of limitation and repose to allow extra time for pre-suit investigations.

The public will be wronged as well, because it is the public that ultimately will suffer when scarce health care resources are squandered to restore a status quo that benefits no one

except some lawyers who fail to fulfill their ethical responsibilities to their clients and properly investigate suits before filing them.

II. THE ACCIDENTAL FAILURE OF SUIT STATUTE DOES NOT NEED TO BE CHANGED.

When a case is dismissed because an attorney did not comply with the Certificate of Merit statute, the dismissal is "without prejudice" and our Supreme Court in Plante v. Charlotte Hungerford Hospital, 300 Conn. 33 (2011) made it clear that the attorney may refile the lawsuit. And that is exactly what happened in the case of Bennett v. New Milford Hospital, Inc., 300 Conn. 1 (2011). After the Supreme Court concluded that the attorney failed to get the appropriate opinion letter, the attorney refiled the lawsuit and the trial date is now set for July 9, 2013.

The only hurdle is that a plaintiff must show that the failure to comply with the Certificate of Merit statute "was the result of mistake, inadvertence or excusable neglect, rather than egregious conduct or gross negligence on the part of the plaintiff or his attorney." Plante, 300 Conn. at 56. The attorney in Plante was not allowed to refile under the Accidental Failure of Suit statute because his conduct was "egregious."

SB 1154 states that its purpose is to "expressly include any medical negligence claim that was dismissed because the plaintiff failed to obtain the written opinion of a similar health care provider." But that is already the law. It appears, therefore, that the purpose is to give lawyers who egregiously violate the law the right to refile under the Accidental Failure of Suit statute. There is no reason to protect attorneys who egregiously violate the law. Hospitals are held accountable if their conduct is merely negligent.

V. CONCLUSION

As part of Tort Reform in 2005, the Legislature passed General Statutes § 38a-395 that requires the Connecticut Insurance Department to issue annual "medical malpractice" reports summarizing data that it receives from malpractice insurance companies and self-insured entities. In the Department's April of 2012 report, the Department notes:

> **Defense Counsel Payments:** Over half of the claims closed with no payments to claimants, yet 73%, or 2,413, generated legal expenses to defend the claim. These expenses totaled $147 million, an average of $61,045 per claim. Of these almost 50% (1,173) were for incidents that had no payments to claimants, averaging $44,938 for legal expenses. For incidents with payments to claimants average legal expenses are higher at $76,283.

Thus, an enormous amount of money is spent defending lawsuits (over 50%) that have no merit. Now that our Supreme Court has ruled that a plaintiff must obtain a written opinion from a "similar health care provider" before filing suit, hopefully these costs will finally begin to go down. The good work achieved by the Legislature in 2005 should be continued -- not undone. The narrow interests of a few members of the plaintiffs' bar should not be allowed to override the public's interest in the delivery of health care by providers whose time and efforts are best devoted to their patients -- not to the defense of non-meritorious law suits.

Very truly yours,

Kurt Barwis